Country Skillet Poultry Company *and* Retail, Wholesale and Department Store Union, AFL-CIO. Cases 10-CA-19395 and 10-RC-12778

31 July 1984

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 December 1983 Administrative Law Judge Leonard N. Cohen issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Country Skillet Poultry Company, Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Retail, Wholesale and Department Store Union, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel has moved to strike certain portions of the judge's decision. The motion is denied. In reaching his decision on the merits of this case Member Zimmerman finds it unnecessary to rely on the judge's comments in the "Statement of the Case" section and part III, A of his decision concerning the Regional Director's handling of the objections aspect of this proceeding.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge. The above matters were heard before me on October 5 and November 9, 1983,[1] in Chattanooga, Tennessee. On August 9, the Regional Director for Region 10, pursuant to a charge initially filed on July 11, and subsequently amended on August 5, issued a complaint and notice of hearing in Case 10-CA-19395. The complaint alleges that Respondent violated Section 8(a)(1) of the Act in the following three instances: (1) on or about March 15, Supervisor Morris threatened employees that Respondent would impose more onerous working conditions on them if they engaged in union activities; (2) on or about March 22, Plant Manager Wagner threatened employees that it would close the plant if employees engaged in union activities; and (3) on or about June 10, plant manager Wagner threatened employees that it would be futile to select the Union as the collective-bargaining agent by telling employees that Respondent "would not reach agreement with the Union on anything."

On August 10, the day after the issuance of the aforementioned complaint, the Regional Director issued an order directing a hearing in Case 10-RC-12788 and consolidated that matter with the outstanding complaint. In this order, the Regional Director recited the following sequence of events: On May 3, the petition in Case 10-RC-12778 was filed and that thereafter, pursuant to a Stipulation for Certification Upon Consent Election, a Board election was held on July 1 among Respondent's production and maintenance employees employed at its Chattanooga, Tennessee, facility. The tally, of ballots showed that of the approximately 141 eligible voters, 45 cast ballots for and 89 against Petitioner. On July 11, the Petitioner filed timely objections to the election. During the investigation, Objections 2 through 5 were withdrawn leaving only Objections 1 and 6 for subsequent consideration. These two objections state in full:

> (1) The employer and its agents threatened employees of [sic] their loss of employment if the Union was voted in.
>
> (6) On 7/1/83 the employer campaigned during the hours of election and had two (2) or three (3) company officials standing approximately 75 feet from the polls and the employees could look directly from the polls at these officials.

In his August 10 order, the Regional Director observed that "substantial and material issues of fact exist which may more appropriately be resolved by record testimony at a hearing." He further noted that certain of the objections were coextensive with conduct alleged in the already issued complaint in Case 10-CA-19395. While the Regional Director at no time discussed in any fashion either the factual basis or legal consideration arising from either objection, he did state at footnote 3 of his order:

> Although Petitioner's Objection 1 specifically alleges a threat of loss of employment, evidence of other alleged threats *within the critical period was presented.* In concluding that record testimony at a

[1] Unless otherwise stated, all dates are in 1983.

> hearing is appropriate, I include for consideration therein all such evidence. [Emphasis added.]

The failure of the Regional Director to either issue a supplemental decision as seems to be the suggested, if not required, method, of handling such matters[2] or, in some other fashion, to identify with any specificity exactly what conduct which of Employer's agents may have committed during the critical time which warranted the overturning of an election was, not surprisingly, the subject of much discussion among counsel and myself both prior to and during the hearing. In this regard, counsel for Respondent complained long and loudly that because of the lack of notice, his client was being denied due process. Despite my pre-hearing observation that it was difficult, if not impossible, to prepare an adequate defense when one did not know with what he was being charged, no such useful information was provided by either counsel for the General Counsel or counsel for the Charging Party prior to the actual calling of witnesses. This lack of notice to Respondent/Employer unfortunately caused much confusion, uncertainty, and undue delay, and generally raised the concept of "trial by ambush" to new heights.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All counsel filed briefs which have been carefully considered.

Upon the entire record of this case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICITION

Respondent is a Nebraska corporation with an office and place of business located at Chattanooga, Tennessee, where it is engaged in poultry processing. During the past calendar year, which period is representative of all times material herein, Respondent sold and shipped from its Chattanooga, Tennessee facility, products valued in excess of $50,000 directly to customers located outside the State of Tennessee. Accordingly, Respondent admits, and I find and conclude, that Respondent/Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORAGANIZATION

Respondent admits, and I find and conclude, that the Union is a labor organization within the meaning of Section 2(5)of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Objection 1—The June 10 Threat of Futility by Wagner*

Between June 8 and June 9, Scott Wagner, Respondent's plant manager, held eight separate meetings in the breakroom with groups of approximately 15 employees to discuss the upcoming union election. Wagner was accompanied at each of these meetings by Billy Hendricks, Respondent's then newly appointed personnel manager.

In support of the threat of futility allegation, counsel for the General Counsel and counsel for the Charging Party rely solely on the testimony of Virginia Graham, one of the approximately 140 employees who attended one of these meetings. According to Graham, a first-shift production worker, Wagner stated during the course of his unscripted presentation that if the Union was elected, the Company would not agree to anything the Union had to offer. Wagner then said that all the Union could give the employees were promises while all the benefits they currently enjoyed had been given to them by the Company. At this point, according to Graham, Wagner added the somewhat inconsistent observation that anything the employees got later would have to be negotiated through a contract.

Wagner testified that at each of the eight meetings he read from a printed speech prepared for the union campaign by Respondent's corporate management. Wagner testified that he did not deviate from the prepared speech and did not field questions that were raised by employees until after he had finished reading the full text. Hendricks fully corroborates Wagner's testimony. The speech which was introduced into evidence states in pertinent part:

> [w]e realize that not everything is perfect here. Every company has areas where improvement can and should be made. Conagra is no exception. We have no doubt of our ability to improve Conagra and to make our plant the best possible place to work in our area.
>
> . . . So what can the Union do for you? A union can't guarantee higher wages or fringe benefits. It is the company that pays your wages and provides your fringe benefits. All that the union can do is try to negotiate these things with the Company. . . . [m]ore important is the fact that if the union becomes your bargaining agent it becomes your sole and exclusive representative. No longer will you be free to come directly to us with your problems as you have in the past.
>
> If the Union were to get in here it could not force this company to do anything that it is unable to unwilling to do [sic] the only way the union could try to force us to do anything that we believe is unreasonable would be by pulling you out on strike.

In evaluating the testimony of witnesses, I have found that in many instances there is a natural tendency for them to testify as to their impressions or interpretations of what was said rather than giving a verbatim account of what actually transpired. I am persuaded that that portion of Graham's testimony in which she recalled Wagner as having issued the threat of futility falls within this general category. Wagner's corroborated testimony regarding these meetings had a genuine tenor of truthfulness and, therefore, I find that Wagner read without de-

[2] Sec. 102.69 of the Board's Rules and Regulations and Secs. 11396 and 11400 of the Board's Case Handling Manual/Representation Proceedings.

viating from the prepared text, and that that text does not support this complaint allegation.[3] Accordingly, I recommend that this complaint allegation be dismissed.

Other than the above cited testimony of Graham, counsel for the General Counsel offered no other evidence of any misconduct on the part of any agent of Respondent during the critical time. Although given the opportunity to present any evidence it wished in support of Objection 1, counsel for the Charging Party offered only a letter distributed to all employees one week prior to the election. In counsel for the Charging Party's view, the first paragraph of this letter constituted threats within the purview of footnote 3 of the Regional Director's order. The first paragraph of this letter states in full:

> I am writing this letter to your home so that you can sit down with your family and discuss with them the important decision that you will be called upon to make July 1. In many ways, this decision could be the most important decision that you will ever have to make in your working life. It is important to you, to your job, and it is just as important to your family, because they too could be affected by your vote next Friday. If you vote the Retail Wholesale Union in, it could be at least three and possibly four years before you can have another election to get rid of it.

I do not view these statements in the same pejorative light as does the Charging Party.

Before the close of the General Counsel's case-in-chief, I inquired, while still on the record, whether she was satisified that all the evidence submitted to the Region during the investigation in support of Objection 1 was presented before me. She responded that it had been. In view of counsel's candid concession and the paucity of evidence of any type threats other than the futility contention made during the critical time, the reference by the Regional Director to additional threats in footnote 3 of his August 10 order becomes even more baffling. Counsel for the General Counsel did not either at hearing or on brief shed any light on this matter. Accordingly, in view of the above, I recommend that Objection 1 be overruled in its entirety.

B. *Objection 6—Presence of Management Officials in the Voting Area*

The election was held on July 1 between the hours of 3 and 5 p.m. in the employee's break or lunchroom. This breakroom, which served both as the polling place and rest area for employees during the election, opens onto the main hallway or corridor directly opposite the supply room. Located some distance from the breakroom but also off the same hallway are Wagner and Morris' offices. The front door of the facility opens directly into this hallway next to these offices.

Employee Vincent Canion testified that he came to the plant about 3:15 and promptly went to the breakroom where, after standing in line for a few minutes, he voted. Immediately thereafter, Canion took a seat at one of the several picnic tables located in the breakroom where he remained until after the polls closed.[4] Canion testified that while sitting at the table, he observed for a period of between 15 to 25 minutes, Richard Kimberling, a management official employed at the nearby Dalton, Georgia, faciltiy. According to Canion's uncorroborated account, Kimberling was at times standing in front of the supply room and at other times pacing the corridor, going in and out of offices.

Kimberling testified that he spent the entire period of the election either standing next to Morris at the front door or in one of the front offices with other officials of Respondent. He denied ever going down the hallway near the supply room. Kimberling's testimony was corroborated in part by Wagner and Morris who each testified that they did not observe Kimberling going near the polling area during the voting.

Based on demeanor considerations, which in the instant case are not insubstantial, and on the probabilities inherent in two conflicting versions, I am persuaded that Kimberling's denial as corroborated by Morris is the more credible. Quite simply, Canion was not a convincing witness. His testimony appeared contrived and rehearsed. Accordingly, I find no merit to this portion of Objection 6.

Next, Benton Pamplin, a production employee who at some unidentified time prior to the election had been suspended for 1 year by Respondent due to a conviction for leaving the scene of an accident, placed Attorney Olson at the entrance to the breakroom after the polls had opened. According to Pamplin's account, he arrived at the plant along with several union officials for the preelection conference. When informed by the Union that it wished to have Pamplin act as its observer, Attorney Olson refused and stated that if Pamplin attempted to sit down at the observer's table, he would call the local police and have Pamplin physically removed. Later during this conference, it was agreed that Pamplin could accompany the others while inspecting the polling place and that he could be the first employee to vote, but that he was to leave the premises immediately thereafter. Pursuant to this arrangement, Pamplin did in fact cast his ballot as soon as the polls opened. Immediately upon doing so, Pamplin walked over to another section of the breakroom where a female employee was sitting and was about to join her when he observed Olson standing in the hallway motioning to him to leave. Pamplin and Olson then left the immediate area. From where Pamplin placed Olson, Olson could observe the entire breakroom, specifically including the voting area.

Although Morris and Hendricks both placed Olson in the front offices away from the breakroom during the election, Attorney Olson did not take the stand to refute Pamplin's account.

Even assuming arguendo that I credit Pamplin's uncontradicted account, I do not view Attorney Olson's

[3] While I do not discredit Graham's testimony on the basis that it is uncorroborated, I do note that in these circumstances one could normally expect the calling of more than one of the approximately 15 potential witnesses to an alleged unlawful utterance.

[4] Respondent ceased all production during the hours the polls were opened. Apparently a number of both first and second-shift employees spent all or part of the election period socializing in the breakroom.

conduct as amounting to either last-minute electioneering or surveillance of the voting area during a election by an agent of Respondent. At most, Olson's presence in the corridor facing the voting area was the briefest in nature and consisted entirely of gesturing to Pamplin that, in accordance with their earlier agreement, he should leave the area immediately upon casting his ballot. Further, there was no showing that any potential voter who may have been in the breakroom even noticed Olson's presence. In these circumstances, I would not find Attorney Olson's brief and rather inconsequential presence in the voting area as adversely affecting the laboratory conditions of the election. *American Display Mfg.*, 259 NLRB 21, 31 (1981). Accordingly, I find no merit to this portion of Objection 6.[5]

C. *Morris' Alleged Threat to Impose More Onerous Working Conditions*

Eddie Johnson, a laid-off production employee, testified that in early April on the day the Union commenced handbilling at Respondent's facility, he overheard a conversation between Day Shift Superintendent Morris and leadperson Linda Benson. According to Johnson, a group of employees including himself and Benson had just left the breakroom and were walking toward the production area when they passed Morris standing in the hallway. Morris motioned Benson over and in a voice loud enough for at least him to hear, proceeded to tell Benson that if she caught anybody outside talking to the Union, she should give them an assignment which would make their job so rough that they would have to quit.

Morris and Benson categorically denied having any such conversation as that described by Johnson. The record evidence indicates that in either late 1982 or the very first part of January 1983, a local of the Teamsters Union attempted to organize Respondent's production and maintenance employees. This effort, which came to management's attention shortly after it commenced, stirred little interest among Respondent's employees, and in late January, it was abandoned. From late January until early in April when the Union commenced its own organizing drive by attempting to get employees to sign union authorization cards, there was no union activity going on at Respondent's facility.

Respondent introduced copies of what it contended were all the leaflets the Union passed out at Respondent's facility. The earliest date on any of these documents is May 19, approximately 6 weeks *after* Johnson testified having seen such handbilling, and 5 weeks *after* Johnson was laid off. Other than through Johnson, no evidence was presented that any handbilling took place at any time during the month of April.

I am unable, based on the entire record, to credit Johnson's account over Morris' and Benson's denials. Johnson was not an impressive witness. His testimony was confused and generally suspect. To credit him, one would have to ignore the uncontroverted record evidence and find that the Union handbilled on the date that it clearly had not. This I am unwilling to do. Accordingly, I find that the General Counsel has not established this complaint allegation by a preponderance of the evidence, and I recommend that this allegation be dismissed.

D. *Wagner's Threat to Close*

In either mid-February or mid-March, Plant Manager David Wagner called together the approximately 50 second shift production employees for an informal meeting in the breakroom.[6] Wagner told the assembled employees that he had received complaints from several employees concerning favoritism being shown some of their number by the second shift supervisor, and that he wanted to discuss with them in private this and any other complaints they had. Toward the very end of this 20- to 30-minute meeting, one of the employees, a Glenda Williams, stated that what they really needed was a union. According to employee Joanie Bethune, Wagner responded, "if the Union comes in, 90 percent of you will lose your jobs and they'll turn this into a dance hall." According to employee Carlene Sivels, Wagner responded, "If we get a union in here, the plant will shut down and become a disco and we will all be out of a job." Finally, employee Pamplin testified that Wagner responded, "That's a foolish thing to say. The last thing you need in here is a union. You don't know these people. Before a union came in, they would close it up and turn it into a disco."

Wagner's own version varies only slightly from the employees' accounts. According to Wagner, he did not respond to the original comment by Williams, but a few moments later as they were leaving the meeting another employee asked him what he thought would happen if the Union got in. To this question, Wagner answered, "For all I know they might turn this place into a dance hall." While I suspect that Wagner went somewhat beyond the rather sanitized version recited above, I will for the purpose of this decision, treat the evidence in the light most favorable to Respondent.

The test of whether Wagner's comment constitutes interference, restraint, or coercion under Section 8(a)(1),

> [d]oes not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.[7]

[5] On brief, counsel for the Charging Pary contends that the mere presence of two or more supervisors at the front door through which second shift voters had to pass also interfered with the conduct of the election. This very subject was specifically discussed on the record prior to the close of the hearing. At that time counsel indicated that the Charging Party was not alleging as unobjectionable conduct Morris' and other management officials stationing themselves at the front door of the building. Even assuming this conduct as now within the purview of Objection 6, in the absence of evidence that Morris and other management officials engaged these employees in any election related conversations, I would not find it as interfering with the conduct of the election. Thus, I find this situation factually distinguishable from that cited by counsel for the Charging Party in *Helfrich Vending*, 209 NLRB 596, 603 (1974).

[6] While the three employees testifying about this meeting placed it in mid-March, Wagner recalled it as occurring towards the end of February.

[7] *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975) and cases cited therein.

It is well settled that if an employer wishes to make predictions concerning the effects of unionization, such predictions must be accompained by supporting objective considerations substantiating such predictions.[8] Here, Wagner, at the very least, expressed his personal opinion that Respondent's corporate management might decide to close the employees' work place if the employees chose to exercise their statutory right and select the union to represent them. Wagner made no attempt to explain such actions would be the sole result of economic considerations and instead left the employees with the clear impression that it would be in retaliation for their union activities. In view of the serious nature of Wagner's remarks, and the fact that it was issued not by some low level supervisor but by the plant manager himself, I reject Respondent's argument that this allegation should be disposed of as "trifling and petty." Accordingly, I find that Wagner's remarks were coercive and thus violated Section 8(a)(1) as alleged.

THE REMEDY

Having found that Respondent has been, and is violating Section 8(a)(1) of the Act, I shall recommened that it be required to cease and desist from such violations and to post an appropriate notice.

The Election

In view of my findings that Respondent neither violated Section 8(a)(1) of the Act during the preelection critical period nor engaged in any conduct adversely affecting the laboratory conditions of the election, I shall recommend that Objection 1 and 6 in Case 1-RC-12778 be overruled and the election results be certified.

On the foregoing findings of fact, and on the entire record of this case, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By informing employees that Respondent might close the facility if the employees selected a union to be their collective-bargaining representative, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. Respondent did not violate the Act in any other manner.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Country Skillet Poultry Company, Chattanooga, Tennessee its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that Respondent close the facility if they selected a union as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the purposes and policies of the Act.

(a) Post at its Chattanooga, Tennessee, facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives all employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform our employees that we may close the facility if our employees select a union to be their collective-bargaining representative.

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[8] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

COUNTRY SKILLET POULTRY COMPANY